35TH CONGRESS, 2d Session. } SENATE. { MIS. DOC. No. 22.

IN THE SENATE OF THE UNITED STATES.

JANUARY 17, 1859.—Referred to the Committee on Claims.

The COURT OF CLAIMS submitted the following

REPORT.

To the honorable the Senate and House of Representatives of the United States in Congress assembled:

The Court of Claims respectfully presents the following documents as the report in the case of

JAMES H. McCULLOH, EXECUTOR OF JAMES H. McCULLOH

vs.

THE UNITED STATES.

1. The petition of the claimant, and amended petition, with certificate of letters of administration to the claimant.
2. Certified copy of docket entries in the district court for the district of Maryland of the cases in which forfeitures were claimed, and also copies of the information in the same cases, numbered from 1 to 9, transmitted to the House of Representatives.
3. Certified copies of releases by the Secretary of the Treasury of goods whereon forfeitures were claimed, transmitted to the House of Representatives.
4. Statements No. 1 and 2 received from the Treasury Department, transmitted to the House of Representatives.
5. Claimant's brief, supplemental brief, and references to documentary evidence.
6. United States Solicitor's brief.
7. Opinions of Judges Blackford and Loring adverse to the claim.
8. Judge Scarburgh's dissenting opinion.

By order of the Court of Claims.

In testimony whereof I have hereunto set my hand and affixed the [L. S.] seal of said Court, at Washington, this seventeenth day of January, A. D. 1859.

SAM'L H. HUNTINGTON,
Chief Clerk Court of Claims.

To the honorable Court of Claims:

The petition of James H. McCulloh, of the city of Baltimore, in the State of Maryland, heir at law and executor of James H. McCulloh, late of said city, deceased, respectfully represents unto this honorable Court, that the petitioner's testator was during the year 1808, and from thence up to the time of his death in 1836, collector of the customs, for the district and port of Baltimore, aforesaid, and as such was entitled to all the privileges, incidents, and emoluments appertaining to said office.

That under the provisions of the 91st section of an act of Congress, entitled "*An act to regulate the duties on imports and tonnage,*" passed 2d March, 1799, (Stats. at Large, L. and B., vol. 1, p. 697,) the said James H. McCulloh, collector as aforesaid, was, with the surveyor and naval officer of said port, entitled in equal proportions to one moiety of certain fines, penalties, and forfeitures which were, during his term of office, incurred at said port.

That on or about the third day of October, eighteen hundred and twelve, the said James H. McCulloh, acting in his capacity of collector as aforesaid, at the said port of Baltimore seized to the use of the United States, as forfeited, nine hundred and sixty-five packages of merchandise, then laden on board a certain ship or vessel called the "Concordia" of Marblehead, whereof one Atkins Adams was then master, for the violation of the 4th section of the act of Congress passed the 1st March, 1809, entitled "*An act to interdict the commercial intercourse between the United States and Great Britain and France and their dependencies, and for other purposes,*"—(Stats. at Large, L. and B., vol. 2, p. 529,) as re-enacted and continued in force by the 3d section of the act of the 2d March, 1811, entitled "*An act supplementary to the act entitled 'An act concerning the commercial intercourse between the United States and Great Britain and France and their dependencies, and for other purposes.'*"—(Stats. at Large, vol. 2, p. 651.)

Your petitioner further shows that by the 18th section of the above mentioned act of the 1st of March, 1809, as re-enacted and continued in force by the 3d section of the said act of 2d March, 1811, the forfeitures which were incurred under the said act of March 1, 1811, were collectable and distributable in the manner provided by the said act of the 2d March, 1799, and might be mitigated or remitted under the act of the 3d March, 1797, entitled "*An act to provide for mitigating or remitting the forfeitures, penalties, and disabilities accruing in certain cases therein mentioned.*"—(Stat. at Large, vol. 1, p. 506.)

That on or about the 7th day of October, 1812, information was filed against said merchandise in the district court of the United States for the district of Maryland, and the necessary proceedings taken to enforce the said forfeiture. That the claimants of said merchandise appeared and filed their answers and prayed that said merchandise should be delivered to them; whereupon, the said court caused the said merchandise to be appraised, and the same delivered

to the respective claimants, who executed their bonds with security to the satisfaction of the court, for the appraised value of said merchandise, they having previously secured the payment of the duties on said merchandise in like manner as if the same had been legally entered.

That the duty bonds so delivered by the said claimants of said merchandise, with the sum of $127 14, which was paid in cash, amounted to the sum of *eighty-three thousand six hundred and twenty-six dollars and ninety-five cents*, being the amount of duties which would have accrued upon said merchandise if the same had been lawfully imported.

That subsequent to the institution of said proceedings against the said merchandise, the owners, or persons interested therein, petitioned the judge of the United States district court for the district of Maryland, praying that the said forfeitures incurred by them as aforesaid might be mitigated or remitted. And the said judge having caused the said petitions with certain statements of facts to be transmitted to the Hon. Secretary of the Treasury of the United States, in accordance with the 1st section of the said act of the 3d March, 1797, the said Secretary of the Treasury did by sundry acts of remission, in accordance with the act of Congress of the 2d January, 1813, entitled "*An act directing the Secretary of the Treasury to remit fines, penalties, and forfeitures in certain cases*,"—(Stat. at Large, L. and B., vol. 2, p. 789,) remit to the said petitioners, all the fines, penalties, and forfeitures which they had incurred as aforesaid, upon the costs and charges that had arisen or might thereafter arise being paid, and on payment of the *duties* which would have been payable by law on the said goods and merchandise if legally imported, and did also direct the prosecutions which had been instituted to cease and be discontinued on the payment of the costs, charges, and duties as aforesaid.

Your petitioner further shows that the said acts of remission were granted by the Secretary of the Treasury before the said merchandise was decreed or adjudged by the said court to be forfeited, and that in consequence of said acts of remission, no such decree or judgment was ever made against the said merchandise by the said court. That in accordance with said acts of remission the said petitioners paid the costs and charges attending the proceedings which had been instituted, and also paid and discharged the bonds which had been given as for the duties on said merchandise. That the amount paid as for duties upon the merchandise, in accordance with the conditions upon which said remissions were made, was the sum of *eighty-three thousand six hundred and twenty-six dollars and ninety-five cents*, ($83,626 95.)

That the said sum of money so paid was by the said James H. McCulloh, collector as aforesaid, in accordance with the then settled practice of the Treasury Department, accounted for and wholly paid into the treasury of the United States, in the same manner as lawful duties were accounted for and paid.

That James H. McCulloh, collector as aforesaid, departed this life on or about the tenth day of November, 1836, and that your petitioner soon afterwards qualified as his executor. And in view of the facts herein set forth, your petitioner claims that under the provisions of the said 91st section of the act of 2d March, 1799, the said James H.

McCulloh, collector as aforesaid, was in his lifetime justly and lawfully entitled, and your petitioner, his executor, is now entitled to one-sixth of the said sum of eighty-three thousand six hundred and twenty-six dollars and ninety-five cents, so received by the United States as aforesaid, which said one-sixth amounts to the sum of *thirteen thousand nine hundred and thirty-seven dollars and sixty-five cents*, ($13,937 65.)

Nevertheless the United States did not in the lifetime of the said James H. McCulloh, collector as aforesaid, pay to him the said sum of thirteen thousand nine hundred and thirty-seven dollars and sixty-five cents, or any part thereof, nor to your petitioner since his death, but continue to hold the same contrary to the rights of your petitioner who avers that so far as he is informed or believes, no action upon the said claim has ever been had in Congress, or by any of the departments of the government.

Your petitioner is solely interested in said claim as executor, and as sole devisee of the said James H. McCulloh, deceased.

J. H. McCULLOH,
Executor of J. H. McCULLOH.

BRENT & KINZER, *Attorneys.*

To the honorable Court of Claims:

The amended petition of James H. McCulloh, of the city of Baltimore, in the State of Maryland, heir-at-law and executor of James H. McCulloh, late of said city, deceased, respectfully represents:

That your petitioner's testator was during the year 1808, and from thence up to the time of his death, in 1836, collector of the customs for the district and port of Baltimore aforesaid, and as such was entitled to all the privileges, incidents, and emoluments appertaining to said office.

That under the provisions of the ninety-first section of an act of Congress, entitled "*An act to regulate the duties on imports and tonnage,*" passed 2d March, 1799, (Stats. at Large, L. and B., vol 1, p. 697,) the said James H. McCulloh, collector as aforesaid, was, with the surveyor and naval officer of said port, entitled, in equal proportions, to one moiety of certain fines, penalties, and forfeitures which were, during his term of office, incurred at said port.

That between the 1st day of August and the 31st day of December, 1812, the said James H. McCulloh, acting in his capacity as collector as aforesaid, seized to the use of the United States, as forfeited, a large quantity of merchandise, laden on board of, and which had been imported into the port of Baltimore in the following named ships and vessels, viz: Ship Marcellus, W. Ward, master, entered 18th September, 1812; brig Penobscot, J. Perkins, master, entered 18th September, 1812; ship Nancy, J. Chote, master, entered 9th October, 1812; ship Concordia, A. Adams, master, entered 7th October, 1812; ship Minerva, J. Gross, master, entered 18th September, 1812; brig Female, C. Childs, master, entered 23d October, 1812; ship Frederick, G. King, master, entered 24th October, 1812; ship Merrimack, C. Cook, master, entered 4th November, 1812; and brig Ann, J.

Page, master, entered 4th November, 1812. That the said seizures were made of said merchandise for the violation of the fourth section of the act of Congress, passed 1st March, 1809, entitled "*An act to interdict the commercial intercourse between the United States and Great Britain and France and their dependencies, and for other purposes,*" (2 Stats. at Large, L. and B., p. 529,) as re-enacted and continued in force by the third section of the act of 2d March, 1811, entitled "*An act supplementary to the act entitled 'An act concerning the commercial intercourse between the United States and Great Britain and France and their dependencies, and for other purposes.'*"—(2 Stats. at Large, p. 651.)

Your petitioner further shows, that by the eighteenth section of the above mentioned act of the 1st March, 1809, as re-enacted and continued in force by the third section of the said act of the 2d March, 1811, the forfeitures which were incurred under the said act of the 2d March, 1811, were collectable and distributable in the manner provided by the act of the 2d March, 1799, above mentioned; and might be remitted or mitigated under the act of the 3d March, 1797, entitled "*An act to provide for the mitigating or remitting the forfeitures, penalties, and disabilities accruing in certain cases therein mentioned.*"—(1 Statutes at Large, p. 506.)

That informations were filed against the said merchandise in the district court of the United States for the district of Maryland, and the necessary proceedings taken to enforce the said forfeitures.

That the claimants of said merchandise appeared and filed their answers, and prayed that said merchandise should be delivered to them; whereupon the said court caused the said merchandise to be appraised, and the same delivered to the respective claimants, who executed their bonds, with security to the satisfaction of the court, for the appraised value of said merchandise, they having previously executed their duty bonds at the custom-house at Baltimore in the same manner as if the said merchandise had been lawfully imported. That the duty bonds so delivered by the said claimants, and the cash paid as for duties, amounted to a large sum of money, to wit: the sum of four hundred and eighty-six thousand six hundred and forty-nine dollars and eighty cents, being the amount of duties which would have accrued and been payable on said merchandise if the same had been lawfully imported.

That subsequent to the institution of said proceedings against the said merchandise, the owners, or persons interested therein, petitioned the judge of the said United States district court, praying that the forfeitures incurred by them as aforesaid might be mitigated or remitted. And the said judge having caused the said petitions, with certain statements of facts, to be transmitted to the honorable Secretary of the Treasury of the United States, in accordance with the first section of the said act of the 3d March, 1797, the said Secretary of the Treasury did, by sundry acts of remission, and in accordance with the act of Congress of the 2d January, 1813, entitled "*An act directing the Secretary of the Treasury to remit fines, penalties, and forfeitures in certain cases,*" (2 Statutes at Large, p. 789,) remit to said petitioners all the fines, penalties, and forfeitures which they had incurred as

aforesaid upon the costs and charges that had arisen, or might thereafter arise, being paid, and in payment of the *duties* which would have been payable by law on said goods and merchandise if legally imported, and did also direct the prosecutions which had been instituted to cease and be discontinued on the payment of the costs, charges, and duties as aforesaid. Your petitioner further shows that the said acts of remission were granted by the Secretary of the Treasury before the said merchandise was decreed or adjudged by the said court to be forfeited, and that in accordance with said acts of remission the said petitioners paid the costs and charges attending the proceedings which had been instituted, and also paid and discharged the bonds which had been given as for the duties on said merchandise. That the amount so paid as for duties on the said merchandise, in accordance with the reservation in said acts of remission, was the sum of four hundred and eighty-six thousand six hundred and forty-nine dollars and eighty cents.

That the money so paid was, by the said James H. McCulloh, collector as aforesaid, in accordance with the then settled practice of the Treasury Department, accounted for and wholly paid into the treasury of the United States in the same manner as lawful duties were accounted for and paid. That James H. McCulloh, collector as aforesaid, departed this life on or about the 10th day of November, 1836, and that your petitioner soon afterwards qualified as his executor.

In view of the facts herein set forth, your petitioner claims that, under the provisions of the ninety-first section of the said act of the 2d March, 1799, the said James H. McCulloh, collector as aforesaid, was, in his lifetime, justly and lawfully entitled, and your petitioner, his executor, is now entitled to one-sixth of the said sum of money so accounted for and received by the United States, as for duties on the said forfeited merchandise, which one-sixth amounts to a large sum of money, to wit: the sum of eighty-one thousand one hundred and eight dollars and thirty cents.

Nevertheless, the United States did not in the lifetime of the said James H. McCulloh, collector as aforesaid, pay to him the said sum of eighty-one thousand one hundred and eight dollars and thirty cents, or any part thereof, nor to your petitioner since his death, but continues to hold the same contrary to the rights of your petitioner, who avers that, so far as he is informed or believes, no action upon the said claim has ever been had in Congress, or by any departments of the government.

Your petitioner is solely interested in said claim as executor, and as sole devisee of his father, James H. McCulloh, deceased.

BRENT & KINZER,
Attorneys for Petitioner.

STATE OF MARYLAND, } *to wit:*
City of Baltimore, }

James H. McCulloh this day personally appeared before the under signed, a justice of the peace for the city and State aforesaid, and

made oath, in due form of law, that the facts set forth in the foregoing petition signed by him, are true, so far as they rest in his own knowledge; and so far as they rest on the information of others he believes them to be true.

Given under my hand this day of June, A. D. 1857.

THE STATE OF MARYLAND, } *sc.*
Baltimore City. }

The subscriber, register of wills for Baltimore city, doth hereby certify that it appears by the records in his office that letters of administration of all the goods, chattels, and credits, of James H. McCulloh, deceased, was on the twenty-sixth day of November, in the year of our Lord one thousand eight hundred and thirty-six, granted and committed unto James H. McCulloh, the executor by the last will and testament of the said deceased appointed.

In testimony whereof, I hereunto subscribe my name and affix the [SEAL.] seal of my office, this 26th day of October, in the year of our Lord eighteen hundred and fifty-seven.

N. HICKMAN,
Register of Wills for Baltimore City.

IN THE COURT OF CLAIMS.

JAS. H. MCCULLOH, EXECUTOR, *vs.* THE UNITED STATES.

Notes submitted by petitioner's counsel.

The petitioner in this case is the executor of James H. McCulloh, deceased, who was collector of the customs at the port of Baltimore during the year 1808, and up to the year 1836. The claim asserted is for the collector's share of moneys received by the United States upon the remission of certain forfeitures, which accrued at the port of Baltimore in the year 1812, under the acts of Congress known as the non-intercourse laws.

The 91st section of the act of Congress of 2d March, 1799, entitled "*An act to regulate the duties on imports and tonnage,*" (Statutes at Large, L. & B., vol. 1, p. 697,) directs the mode of distributing all fines, penalties, and forfeitures, to wit: One moiety to the government, and the other moiety in equal proportions to the collector, surveyor, and naval officer of the port, &c.

The forfeiture in this case was incurred under the 4th section of the act of Congress of the 1st of March, 1809, entitled "*An act to interdict commercial intercourse between the United States and Great Britain and France and their dependencies, and for other purposes.*—(Statutes at Large, L. & B., vol. 2, p. 529.) This with other sections of said act was re-enacted and continued in force by the 3d section of the act of Congress of the 2d of March, 1811, entitled "An act supplemen-

tary to the act concerning the commercial intercourse," &c., &c.—(Statutes at Large, vol. 2, p. 651.)

The 18th section of the act of 1st of March, 1809, provides how the forfeitures and penalties may be prosecuted and recovered, and makes them distributable under the act of 2d of March, 1799. It further provides that they may be mitigated or remitted under the remitting act of 3d March, 1797.—(See Remitting Act of 3d March, 1797, Statutes at Large, vol. 1, p. 506.)

In 1812, when the forfeiture in this case occurred, it was in the discretion of the Secretary of the Treasury to remit the same, under the act of the 3d March, 1797.

Congress subsequently passed the act of the 2d of January, 1813, entitled "*An act directing the Secretary of the Treasury to remit fines, forfeitures, and penalties, in certain cases.*"—(2 Statutes at Large, p. 789.) This act deprived the Secretary of his discretionary power, and imposed upon him the obligation to remit the forfeitures, upon the conditions mentioned in this act, in all cases where the necessary facts were proved, "*upon the payment of duties which would have been payable by law on such goods, wares, and merchandise if legally imported.*"

Upon an examination of the acts of 3d of March, 1797, and the 2d of January, 1813, it will be seen that there is a marked difference between them. 1st. The facts to be established under the act of 1797 are not required to be proved under the act of 1813. 2d. No discretion is given the Secretary under the act of 1813. And 3d. The *terms* of the remission are prescribed by the act of 1813. The act of the 2d of January, 1813, as to any action under it, seems to be in the nature of a legislative remission, applying retrospectively to the relief of forfeitures incurred *before* its passage; and this is a most material circumstance to be borne in mind.

In this case the remission was made under the act of January 2d, 1813, operating independently of and differing in its essential provisions from the act of 1797. It possessed the same vitality, and afforded as full a measure of relief without as it possibly could with the act of 1797 still in force. The rights of the parties not being in any wise affected by the act of 1797, we may disregard its provisions entirely in the argument.

The questions now arising are: 1st. What is the nature of the collector's interest in the forfeitures? 2d. How did the remission under the act of 1813 affect the interest of the collector in this case?

Upon the seizure of the prohibited articles the right of the collector to his share thereof became inchoate merely. The judgment of condemnation consummated this right, subject however to be divested by the remitting act of the Secretary of the Treasury, under the act of 1797, at any time before the proceeds were received for distribution.—(United States *vs.* Morris, 10 Wheat., 246.)

In the case now under consideration there was no actual judgment of condemnation, but nevertheless the fact of the breach of the law was fully established by the act of the parties in seeking relief under the act of 1813. The relief by that act was granted only to persons who "*had incurred any fine, penalty and forfeiture, under the act of*

1*st of March*, 1809," *&c.* The petition for relief, therefore, was an admission of the forfeiture by the parties who had incurred it as fully as if the judgment of condemnation had passed. The inchoate right of the collector became consummated upon the establishment of the forfeiture, by the admission of the parties, as complete as if the judgment of condemnation had been rendered. The practice of the Secretary of the Treasury in such cases was not to remit before condemnation, unless the petitioner would admit that the forfeiture had been incurred.—(See Justice Thompson's opinion on U. S. *vs.* Morris, 10 Wheat., 246.) By this seizure, then, the collector had a right in the property seized to the extent of one-sixth, to be consummated upon establishing the fact of the forfeiture, either by the judgment of the Court, or the admission of the parties.

How was this interest affected by the remission?

The right of the collector had attached before the passage of the act of 2d January, 1813. To concede that the remission in this case divested this right, would be to concede to Congress the power that is to operate by legislation upon *pre-existing* rights.

The legislation of Congress upon the subject of remission has always been with a saving of pre-existing rights; and such they have always considered to be the rights acquired by seizure. See the evidence of this in the act of 3d March, 1797.

It is well established by repeated decisions of the Supreme Court, that under the act of 1797 the remitting power of the Secretary extended to the interest of the revenue officers, even after condemnation. This construction of the law did no violence to the rights of the seizing officers, because the law was in existence at the time the seizure was made. The rights of the officers attached, subject to the then *existing* right in the Secretary of the Treasury to remit the interest of all parties.

In the present case, however, the rights of the seizing officers had attached prior to the enactment of the law under which the remission was made. And it was not in the power of Congress to operate by legislation upon pre-existing vested rights. The petitioner, however, does not set up a claim to one-sixth of the thing forfeited, but to the proportion which his testator as collector was entitled to of the amount reserved to the government as the condition of the remission, and which the government actually received.

The remission was made upon the condition mentioned in the act of 2d January, 1813, viz: "Upon payment of the costs and charges attending the proceedings, and on payment of *duties* which would have been payable by law on the said goods and merchandise if legally imported." Under this remission the government received the sum of $83,626 95.

We submit that the case of McLane *vs.* The United States, 6 Peters, 404, justifies the claim now asserted.

In that case the forfeiture was incurred before the passage of the act of January 2, 1813, but came not within the provisions of that act for relief. In July, 1813, Congress passed a special act for the relief of the owners, giving to them the benefit of the act of January 2, 1813, except that the amount to be paid should be the same as the

duties which would have accrued upon similar goods legally imported, and arriving after the 1st July, 1812, when, by act of Congress, the duties were doubled. This act placed the owners on precisely the same footing, as to the amount to be paid, with those whose cases came under the act of January 2, 1813. The amount paid by them was measured by the rate of duty in force after July 1, 1812. The special act gave relief on precisely the same terms.

The fact of the forfeiture being established, and that it was incurred for the violation of the non-intercourse laws, the reservation cannot be regarded as a mere payment of lawful duties, but must be regarded as a part of the forfeiture reserved out of the proceeds of the forfeited cargo.

In the case of McLane, above mentioned, it is clearly stated by Justice Story that, "In point of law no duties as such can legally accrue upon the importation of prohibited goods. They are not entitled to entry at the custom-house, or to be bonded. They are *ipso facto* forfeited by the mere act of importation. The cargo being prohibited from importation, it is impossible, in a legal sense, to sustain the argument that the importation could be deemed innocent, and the government could be entitled to duties as upon a lawful importation. It was entitled to the whole property by way of forfeiture, and to nothing by way of duties."

"When Congress authorized the remission upon the payment of *double duties*, the latter was imposed as a condition of restitution upon the offending party," &c.

"That duties, as such, could not have accrued, the reservation in point of law was of a part of the forfeiture."

Now the argument of the court in that case rests clearly on the ground that duties, as such, did not accrue upon illegal importations. The reservation was "upon payment of duties which would have accrued, if the cargo had been lawfully imported subsequent to July 1, 1812." The argument holds equally good in this case, for the act of 2d January, 1813, operates "upon payment of the duties which would have been payable by law if legally imported." (By adding the words "after the 1st of July, 1812," the acts are identical.)

As the court has decided the principle in McLane's case, that the reservation, under such circumstances, was not of *duties*, because none had or could accrue on the forfeited merchandize, so in this, as no duties, as such, did or could accrue, the reservation, in point of law, was not of duties as such, but of a *part of the forfeiture*.

But further, the court say, page 427: "If the government had received a gross sum, equivalent to the double duties, out of the forfeiture as a condition of the remission, there could be no doubt that the collector would have been entitled to his share of the moiety of the sum so reserved." Can it make any difference, in point of law, that the reservation is made by a reference to double duties, as a mode of ascertaining that sum? "The double duties are referred to as a mere mode of ascertaining the amount intended to be reserved out of the forfeiture; and not as a declaration of intention on the part of the government, that they were to be received as legal duties, due upon a legal importation."

So in this case, we submit, that the reference in the act of January 2, 1813, was to duties merely to ascertain or measure the amount to be reserved, and was not a declaration on the part of the government that they were to be received as legal duties, due and payable upon a legal importation.

Again, in the same case, page 427, the court lays down the general proposition that "whatever is reserved by the government out of the forfeiture is reserved as well for the seizing officers as for itself, and is distributable accordingly."

The conclusion is therefore irresistible, that as the act of January 2, 1813, did not and could not make legal that which was illegal, that the reservation was not of duties as such, but a part of the forfeiture, measured in amount by the rate of duty; the amount received in this case was received by the United States for the joint benefit of the government and the revenue officers of the port of Baltimore. The petitioner, as executor of the collector, claiming one-third of one-half.

The only remaining question, and the important one to the petitioner is, is the government bound to refund the money which it has received to the use of his testator?

In anticipation of an argument upon the principle of law, "that money paid under a mistake of law, cannot be recovered back in a legal action," we submit; that whilst the principle is well settled between individuals, it does not prevail as between the government and its officers, or as between an executive department and its agents acting under its control and direction. The parties in the latter cases do not stand upon an equal ground. The collector holds his position at the will of the Treasury Department. His position is that of an inferior, under the power and disposition of a superior. He acts under a *duress* of power, which for any disobedience may be exercised to his prejudice. The whole relation existing between the Treasury Department and collectors of the customs is different from that existing between individuals. In the latter case each acts independently of the other in the exercise of an unrestrained judgment, and with a jealous regard for their legal rights. Not so, however, is it in the other case. It is the custom of the Treasury Department to give instructions to the revenue officers, under the laws which govern their action. The rules of the department, and its construction of the revenue laws, from the foundation of the government, have been communicated to the revenue officers through circular letters, and those officers, in the discharge of their official duties, look to their official head for instructions upon doubtful points. The mode of adjusting accounts, the legality of charges, the amount of commission to be paid, the manner of making disbursements; indeed almost every question under the law is construed and interpreted by the department. It is the source of "superior wisdom and authority," which, from the beginning of the government they have looked to for "an infallible rule," to govern them in their official action. Obedience to the established opinions and instructions of the Treasury Department, has ever been regarded as a sufficient indemnity against damage or loss. It is not difficult to point to numberless cases where the government has indemnified

its officers for damage sustained in carrying out the instructions, or in acting upon the established practice of the executive department under which they are employed, when the instructions or the practice afterwards proved to be illegal.

What was the *settled practice* of the government in relation to the amount reserved in such cases, upon the remission of forfeitures?

We have been unable to obtain the circular instructions or the expressed views of the Secretary of the Treasury upon this subject, but it would seem from the action of the government in the case of McLane, 6 Peters, that the reservation was regarded as lawful duties, accruing wholly to the government. And such seems to have been the admitted practice of the government, by the Attorney General in his argument of that case.—(See pp. 419, 420.)

The government, then, having established a practice in such cases, and having undertaken to give a construction as to the legal effect of its own acts for the guidance of its officers, precludes it, in our view, from taking a technical advantage of the acts of its officers, when those very acts were based and founded upon the practice which the superior department had established for their guidance.

In this case, the money reserved by the remission was received by the collector, and by him, in the perhaps too rigid respect for the established practice or law of the Treasury Department, paid over to the United States. It subsequently turns out that a part of this fund was his own. The "practice of the department," or the law of the treasury, in respect to which he freely paid the money, is decided by the highest legal tribunal to have been erroneous. Will a just government refuse to restore to its officer that which it had innocently, yet illegally, exacted from him in the discharge of his duties?

The policy of the government is opposed to such a principle. The fullest respect should be due from the inferior to the views and instructions of the superior officers of the government, and obedience should never be repaid with injustice.

"While it is not pretended that the command of a superior justifies the tort or trespass of his inferior, still the general policy of the law requires that ministerial officers, and particularly officers of the revenue, should be protected when they have acted in good faith under the instructions of their superior."

Collectors of the revenue are under the direction of the Secretary of the Treasury, to whom the direction and superintendence of the collection of duties is expressly delegated. Sound policy demands that they should respect his instructions. Establish, then, the principle that obedience to instructions from the superior does not constitute an immunity against loss or damage to the inferior officer, and you thereby extend to the inferior officers an unrestrained license to contest with the government in the courts the legality of every instruction under which they may be called to act. Men in all situations desire to act safely, and if their rights cannot and will not be protected in their obedience to the established practice and rules laid down by the department under which they serve, their only safety is to delay action until the courts shall determine for them. It is, therefore, the policy of the government to avoid an endless litigation with its officers, and

promptly to repair any losses or damage which they may sustain in their obedience to all instructions, or to the established practice of the department under which they act.

It is not an infrequent occurrence in the administration of the laws that the collectors, acting under the instructions of the Secretary of the Treasury, levy and exact illegal duties from the importer. The importer notifies the collector that he deems the duties illegal, and not to pay over the same. The collector, nevertheless, still acting under the instructions, pays over the money to the treasury. The importer brings his action against the collector, and recovers from him the illegal charges. "The collector in such a case would be in a position to claim indemnity from the government."—(Elliott *vs.* Swartwout, 10 Peters, 154.)

If, in such a case, the collector is, as the court says, in a position to claim indemnity from the government, why not in the present case? The notice given the collector only enables the importer to sustain his action against *him*, and merely negatives the presumption of the assent on the part of the importer to the justice of the demand. The payment, however, by the collector, is voluntary, and against the warning of the importer. But it is made under the rule or established practice of the department, and for this reason alone he is in a position to claim indemnity of the government.

So in this case, the department had decided that the reservation was to be considered as lawful duties. And the "established practice" was, that the whole was to be paid into the treasury as duties. The payment having been made under this "established practice" and decision of the department, the collector was equally in a position to claim indemnity from the government for the loss which, by his obedience to his superiors, he has sustained.

In the case of Tracey & Balestier *vs.* Swartwout, 10 Peters, 98, the Supreme Court again recognizes the doctrine that the government is bound to indemnify the officer for damages sustained by him for illegal acts done under the instructions of a superior.

The rule, we think, applies as well to cases between the government and the officer as to those where third parties are interested. By the payment of money into the treasury under the established practice of the department, erroneously treating the fund as belonging wholly to the United States, the party in this case has been deprived of the share of the fund which subsequently turns out to have been legally his own. By his obedience to the instructions of his superior he has been damnified to that extent. And the government is bound to indemnify him.

BRENT & KINZER,
Attorneys for the Petitioner.

JAMES H. MCCULLOH, EXECUTOR, *vs.* THE UNITED STATES.

Supplemental brief of petitioner.

After the brief of the petitioner's counsel was printed and filed, we for the first time obtained the decisions of this court in the cases of *Sturgis, Bennett & Co., The Estate of James Beatty*, &c., &c.

We refer the court to its own opinion in these cases, as applying with peculiar force to the case under consideration, and as conclusive of the question as to the right of the petitioner to recover.

If we properly appreciate the views of Judge Blackford, expressed in his dissenting opinions in the cases above referred to, they do not apply to this case.

His views, as we understand them, were—

1st. That as the importer had paid the money *without protest* it was not illegally received; the law requiring from the importer a protest, as a condition on which he may sue for the duties.

2d. That, as the act of 26th February, 1845, barred an action against a collector by an importer for duties paid without protest, and that as such a suit against a collector is in substance a suit against the United States, the action brought in the Court of Claims was also barred by the said act of 1845.

We submit that the rights of the parties in this cause are in nowise affected by the act of 1845, however applicable the same may be to suits instituted by importers (in the absence of a protest) for duties.

BRENT & KINZER.
For the petitioner.

IN THE COURT OF CLAIMS.

JAMES H. MCCULLOH, EXECUTOR, *vs.* THE UNITED STATES.

In addition to the evidence on file in this cause, comprising the papers from the custom-house and United States district court, we submit the following in proof of the allegation of the petition, "That the money so paid was, by the said James H. McCulloh, collector as aforesaid, *in accordance with the then settled practice of the Treasury Department*, accounted for and wholly paid into the treasury of the United States in the same manner as lawful duties were accounted for and paid."

We arrive at the practice of the department from its cotemporaneous views and acts in respect to these forfeitures.

The Executive department always treated these prohibited importations as *dutiable*.

In the President's message, November 4, 1812, it is stated that "the revenues for the ensuing year will be augmented by THE DUTIES on the late unexpected importations from Great Britain."

The Secretary of the Treasury, in his report of December 1, 1812, says "that the revenues arising from importations amount to the sum of $12,500,000, of which sum $5,500,000 arise *from duties* on the late importations from Great Britain"

Having thus been improperly regarded as dutiable importations, the 865th article of the Treasury Regulations was erroneously applied to them, and, under that regulation, the amounts paid under the remissions were accounted for and retained *as duties*.

The views and practice of the department in such cases are further shown by the case of McLane *vs.* The United States, 6 Peters.—(See argument of the Attorney General in that case, p. 419.)

The Secretary of the Treasury claimed the right to remit the share of the forfeitures which would otherwise fall to the officers of the customs, and to retain the other half, or to remit it on different terms. See his letter to Committee of Ways and Means, vol. 8, American State Papers, and 2d on Finances, 12th Congress, 2d session p. 570, No. 379. See also, as to the views of the department on the subject of forfeitures under the non-importation acts and the prosecution of the forfeitures, Gallatin's letter to Committee of Ways and Means, November 12, 1812; Gallatin's letter to Committee of Ways and Means, November 23, 1812; Comptroller's letter to district attorneys, May 15, 1812; and a subsequent letter of Comptroller to district attorneys. The above letters are to be found in 8 American State Papers, p. 570, No. 379.

The legislation on the subject will be found in 3 Niles' Register, pp. 222, 239, 255, 272.

A succinct history of the legislation and the course of the department on the subject, is found in the Historical Register, 1812–'13, vol. 1, p. 59.

BRENT & KINZER,
Attorneys for Petitioner.

IN THE COURT OF CLAIMS.

ON THE PETITION OF JAMES H. MCCULLOH, EXECUTOR OF JAMES H. MCCULLOH, DECEASED.

Brief of the United States Solicitor.

The grounds on which this claim is placed are, that certain merchandise was forfeited because imported in violation of the 4th section of the act of March 1, 1809, (2 Stat., p. 529,) prohibiting trade with England, as re-enacted by the 3d section of the act of 1811, (Ib., 651;) that the merchandise was seized as forfeited at the instance of claimant's testator, who was then collector of the port of Baltimore, on 7th October, 1812, but before the same was condemned, and the proceeds distributed, the act of 2d January, 1813, (2 Stat., p. 789,) was passed, and the forfeiture was remitted under that act on payment of costs and

duties by the importers. It is claimed that one-half of the sum of $83,626 95, which was received by the collector *as duties* on account of this merchandise, and which was paid by him into the treasury as duties, was paid by him under a mistake of the legal rights of the officers of the customs, as since ascertained by the decision of the Supreme Court in the case of McLane *vs* The United States, (6 Peters, 404,) which decision it is contended declares that what the act of January, 1813, calls *duties*, was in fact *a part of the forfeiture*, and was received as such by the collector, and was therefore subject to distribution according to the 91st section of the act of March 2, 1799, (1 Stat., p. 697 ;) wherefore the petitioner claims one-sixth of said amount, or the sum of $13,937 65.

It appears by Mr. Gallatin's report as quoted in Mr. Attorney General Taney's brief in McLane's case, that the merchandise, &c., relieved from forfeiture by the act of 2d January, 1813, amounted to eighteen millions, and that the duties received on this merchandise amounted to five millions ; so that on the question presented by this case the sum of two and a half millions is depending.

It is a question, therefore, of great importance. I should not, however, have thought the construction of the act of 1813, upon which it depends, was one upon which there could be a serious controversy, but for the decision on which the claimant relies.

The language of the act of January, 1813, which bears on this question, is as follows : "In all such cases * * * the Secretary of the Treasury is hereby directed to remit all fines, penalties, and forfeitures that may have been incurred under the said acts in consequence of such shipment, importation or importations upon the costs and charges that have arisen or may arise being paid, and on payment of the duties which would have been payable by law on such goods, wares, and merchandise, if legally imported."

The law, it will be observed, is peremptory in requiring the Secretary to remit "*all fines, penalties, and forfeitures*" in such cases on payment of costs, and "on payment of the duties which would have been payable by law on such goods, wares, and merchandise if legally imported." Is there in these words any thing to distinguish the *duties* which it lays on the merchandise referred to in the act, from the duties imposed by other acts ; or was there any thing in the circumstances of the case to prevent the imposition of such duties ? The act simply imposes the ordinary duties instead of the forfeiture which had been incurred.

The customs officers have never claimed the right to divide with the government the *duties* levied under any other act but this, and it is only by transforming what this law expressly calls *duties*, and unquestionably meant to impose, collect, and dispose of as duties, into a different thing *by construction*, that such a right can be maintained under this act. The duties imposed by a similar act are construed to be forfeitures, because the government, says the Supreme Court, (6 Peters, p. 427,) "was entitled to the whole property by way of forfeiture, and to nothing by way of duties ; when, therefore, Congress authorized the remission upon the payment of double duties, the latter was imposed as a condition of restitution upon the offending party."

And on the same page it is said: "It has not been pretended that the act of the 29th of July, 1813, could divest the rights of the collector antecedently vested in him by existing laws; and if such a doctrine could be maintained at all, it would still be necessary to establish that there was an unequivocal intention on the part of the government to remit his share, and to retain its own share of the forfeiture. Such an extraordinary exercise of power ought to be evidenced by terms susceptible of no doubt; we are of opinion that the present act neither justifies nor requires any such construction. The double duties are referred to as a mere mode of ascertaining the amount intended to be reserved out of the forfeiture, and not as a declaration of intention on the part of the government that they were to be received as legal duties due upon a legal importation."

This is the whole of the reasoning in the case, and the amount of it is, it is assumed that no duties could accrue on goods the importation of which was prohibited, and therefore the provision of the law for the payment of what it calls duties must be treated as a reservation of a part of the thing forfeited; and as the officers were entitled to one-half of all forfeitures, they were entitled to that portion of what was reserved out of these.

Why is it that the government could not in such cases exact the ordinary duties payable on merchandise lawfully imported, instead of the forfeiture?

The argument of Mr. Sergeant, p. 413, whose conclusions were adopted by the court, is, that "no duties were by law payable upon those goods. No duties could accrue upon them. Duties by law accrue and are payable only upon goods imported according to law. No duties are or can be payable upon goods brought in contrary to law, and in violation of law. They cannot be, for the most obvious and conclusive reasons. Duties accrue not upon arrival in the United States, but upon arrival at the *port of entry*.—(United States *vs.* Vowal, 5 Cranch, 368; Arnold *vs.* United States, 9 ib., 104; S. C. 1 Gall., 348.)

"But forfeiture to the United States also accrues, at latest, immediately upon arrival in the United States, and before arriving at the port of entry. No matter when the seizure took place, it has relation back to the time of offence committed, and overreaches a bona fide sale."

The reason given by Mr. Sergeant, which is the only reason given in the report of this case, why no duties can be imposed on goods the importation of which is prohibited, is, that forfeiture accrues on arrival in the United States, and duties do not accrue till arrival at port, or, in other words, the property becomes the property of the United States, and is not therefore subject to duty when it comes into port.

I admit that "a forfeiture attaches *in rem* at the moment the offence is committed, and that the property is instantly divested," and becomes vested in the United States; and I also admit, that whilst the property *continues* in the United States no duties could accrue; but the *remittur* like "the seizure has relation back to the time of offence committed;" and when the property is thus restored, it is subject to all the incidents of ownership by the importer *as from the time of such reinvestment of property* in him. Sales, and all other intermediate dispositions of it, or liens upon it, are affirmed by the *remittur* to the same extent

that they are divested by the seizure, condemnation, &c.; and, therefore, if the law of 1813 had not expressly imposed the duties on this merchandise, the duties imposed in this case would have accrued on the remittur as an incident to importation under the general law imposing duties, and such duties might have been lawfully exacted on the merchandise as *the condition* precedent to the delivering of it to the importer. Would the importer in a suit for the goods, or for the recovery of duties paid under protest under such circumstances, be allowed to say that no duties were payable because the goods were imported in violation of law, which subjected them to forfeiture, and the government having remitted the penalty affixed to such an offence, the goods became vested in the importer discharged of all claims? I think not. The answer would be that the law imposes the duties upon all goods which are imported, and there is no exception, either express or by implication, as to those which are illegally imported, which may become forfeit, but which are not proceeded against and actually forfeited. There is no express exception even of goods which are actually forfeited, the possession of which is retained till sold by the marshal; but the exception arises by implication in such cases, because the goods become the property of the government before duties accrue, and property of the government is not subject to duty; and as they continue to be property of the United States, and are not afterwards parted with to the importer or to any one else, as *of the time at which the forfeiture* was incurred, duties cannot accrue in such a case. In such a case the law does not apply, because the reason of the law is inapplicable. But if the forfeiture is remitted, or not prosecuted, both the words and reason of the law require that duties should be paid.

If, therefore, Mr. Sergeant's own mode of reasoning be pursued, there is no legal impossibility in the proposition that duties may accrue on goods, the importation of which is prohibited by special act, when the forfeiture imposed by such act is remitted, and the importer fully reinstated in the property in said goods. As the only reason assigned why the goods were exempt from the duties which the law imposed on similar goods was the ownership of the government, the release of such rights by the government would remove that obstacle.

If therefore the act in question does in fact release the forfeiture or the rights which the government acquired under the special law which imposed such forfeiture, it is not material to inquire whether the act authorizing such release had the effect of legalizing the importation. It is enough for the purposes of this case, and to answer the argument relied on, if the purpose of the act was to divest the government of its rights in this property as a forfeiture, and to exact only the duties payable under the general law, which all owners of such property were bound to pay the government on importing it into the United States. This is what the act before us professes to do. If it were universally true, that goods illegally imported were exempt from duties, it would be certainly an abuse of terms by Congress to speak of the payment required in this case as a payment of duties, and such payments, whatever they might be termed in the law, must be deemed forfeiture. But if, on the other hand, duties can be collected, and are in fact

collected on prohibited goods, it certainly is the duty of the court to consider as duties what Congress has called by that name. I have shown the reasoning adopted in McLane's case, that if the government released the forfeiture, and reinvested the importer in the ownership, duties might accrue. The act of 1813 releases the forfeiture on payment of the ordinary duties, which, as I have shown, is equivalent to an absolute release of the rights of the government in virtue of the forfeiture; and the requirement of payment of duties expresses merely what the law would imply as the consequence of the extinguishment of the right by forfeiture, viz: the revival of the right to duties. But it is argued, from the form of the sentence, that this payment of the duties was required *as a condition*. This is immaterial. This act, like other acts, professes to exact the payments as duties, and this they undoubtedly were, if Congress could, under the circumstances, exact duties, because the payments are expessly so called.

I have shown that, even consistently with the reasoning in McLane's case, duties should be collected when the forfeiture was remitted, and accrued by the extinguishment of the right by forfeiture. But I shall now show that, *in this case*, according to the practice of the government, which has been sanctioned by the Supreme Court, duties would have been due in any event, and belonged to the government exclusively.

The petition states: "That on or about the 7th day of October, 1812, information was filed against said merchandise in the district court of the United States for the district of Maryland, and the necessary proceedings taken to enforce the said forfeiture. That the claimants of said merchandise appeared and filed their answers, and prayed that said merchandise should be delivered to them. Whereupon the said court caused the said merchandise to be appraised, and the same delivered to the respective claimants, who executed their bonds with security to the satisfaction of the court for the appraised value of the merchandise, *they having previously secured the payment of the duties on said merchandise in like manner as if the same had been legally entered.* That the *duty bonds* so delivered by the said claimants of said merchandise, with the sum of $127 14 which was paid in cash, amounted to the sum of $83,626 93, being the amount of duties which would have accrued upon said merchandise if the same had been lawfully imported."

The 865th article of the treasury regulations requires that, "before merchandise under seizure can be delivered to the claimant on bond under the 89th section of the General Collection law of 2d March, 1799, the certificate of the collector that the duties on such merchandise *have been paid*, must be produced." Until cash payments for duties were required, it was certified in such cases that the duties had been "*secured;*" and it appears by the petition that the duties were thus "secured" by bond in this case.

Art. 865 further provides, that "these duties *belong to the United States*, and must be retained in the treasury, whether the merchandise be decreed forfeited or not."

The Supreme Court of the United States, in the case of Hoyt vs. United States, 10 Howard, at p. 137, also says: "*Duties thus paid*

constitute no part of the proceeds of the goods forfeited, in which only the collector has an interest. The proceeds are the appraised value secured by the bond, or, in case no bond be given, the amount derived from the sale by the marshal. The payment of the duties is a condition to the acceptance of the bond, and is the voluntary act of the claimant. They do not enter into the question of condemnation, nor constitute any part of the forfeiture declared by the act or the judgment of the court." The question thus decided in Hoyt's case is the exact question presented by this case. In both a claim was set up by a collector for duties received by the government on account of forfeited goods, which had been paid in one case in cash, and were secured in the other by bond before the goods were delivered up on another bond for their appraised value, and which therefore according to this decision belonged to the government in any event.

The court say, indeed, that Hoyt's case "is not like that of McLane; there the sum in controversy was reserved out of the forfeiture by the act for the relief of the owners, and was *regarded by the court* as part and parcel of it. The only doubt that existed was, whether or not the amount thus reserved should be considered the legal duties belonging to the government, or a portion of the forfeiture, the residue of which had been remitted. The amount was to be equal to the double duties imposed on goods imported under certain circumstances, by an act passed since the forfeiture accrued; and *the court was of the opinion* that duties mentioned in that act were referred to simply as a measure to determine the sum to be reserved, and not as duties in the common acceptation of the term."

The mode here adopted of setting forth McLane's case is very significant. "*The court regarded*" *the amount reserved as part and parcel, &c.* "*The court was of opinion that duties mentioned in the act were referred to simply as a measure to determine the amount to be reserved,*" *&c.* This signifies that the court, whose opinion Judge Story gave, thought so—not the court whose opinion Judge Nelson gives; as much as to say, we take their description of the case before them, and set forth in that way what they decided. This may not be regarded as the expression of dissent from the opinion in 6 Peters, but it certainly intimates no concurrence in the views which the opinion given by Judge Nelson is so particular to set forth as the views of the court as given by Judge Story. However this may be, there is, at least, an irreconcilable difference in the decisions on one point, and that the only material point in this case, viz., whether *duties* as such could be collected on forfeited goods. In 6th Peters it was held that duties as such could not be collected on forfeited goods; that the government was entitled to the whole as forfeiture, and *to nothing* by way of duties; and hence it was inferred that whatever was received must be forfeiture, in which the officers were entitled to share. But in Hoyt's case the court say, that where goods were seized as forfeited, and, prior to bonding them for their appraised value, payments were made as for duties, those payments were no part of the forfeiture.

The whole question here is, whether duties as such can be collected on forfeited goods. In 6th Peters, what the law expressly calls duties are converted into forfeiture, because duties as such cannot be collected

when forfeiture is incurred. In Hoyt's case precisely the reverse is held as respects duties which were collected on goods which had been actually forfeited, and they were held to be duties notwithstandiug the forfeiture. How does that case differ from the present? If the proceedings had gone on in this case, and the goods had been condemned and sold, the proceeds of the bond given for them would have been divided. Hoyt's case decides that there would then have been no claim for any part of the duties paid. Do the duties which were paid, or bonded at the time the goods were bonded, become forfeiture by the fact that before the goods are condemned, or the proceeds of the bond given for them is received for distribution, *the forfeiture* was remitted. If the duties are not a part of the forfeiture in one case, how can they become so in the other? In Hoyt's case the court declares that "the duties constitute no part of the proceeds of the goods forfeited," and are not "part of the forfeiture. The payment of the duties is a condition to the acceptance of the bond and redelivery of the goods."

The case at bar was precisely similar in all respects, as the petition shows, except that a *bond* for the duties was given instead of a cash payment being made at the time of the redelivery of the goods. This was as distinct from the bond given for the appraised value as the cash payments in Hoyt's case, and was no more part of the forfeiture than the cash paid, and was, like that cash, according to this decision and according to the Treasury regulations the exclusive property of the government, "whether the merchandise be decreed forfeited or not."

The ruling in McLane's case, that no duties, as duties, could accrue on forfeited goods, is not sustainable by the reasoning which led to it, where the forfeiture was remitted and property reinvested in the importer as in this case; and is overruled by Hoyt's, on the turning point in this case, that the payments made as for duties preliminary to bonding merchandise seized as forfeited, were not part of the forfeiture.

Let us now examine the reason avowed by the court in McLane's, as the ground for resorting to the strained construction to which it had recourse to set aside the plain meaning of the act of Congress, as it was understood at the time of its passage by McLane himself, (see his Protest, 6 Peters, 408,) by McCulloh, and by every one else.

The court says: "It has not been pretended that the act of 29th July, 1813, could divest the rights of the collector antecedently vested in him by the existing laws. And if such a doctrine could be maintained at all, it would still be necessary to establish that there was an unequivocal intention on the part of the government to remit his share, and to retain its own share of the forfeiture. Such an extraordinary exercise of power, if it could be maintained, where it is subversive of existing rights, ought to be evidenced by terms susceptible of no doubt. We are of opinion that the present act neither justifies nor requires any such construction. The double duties are referred to as a mere mode of ascertaining the amount intended to be reserved out of the forfeiture," &c.

By reference to the protest of McLane, it will be seen, however, that he protested againt granting the prayer of Girard because he

alleged "that the right and interest thus vested in him by virtue of said seized forfeiture and sentence of condemnation *in the said moiety of the said ship and her cargo was absolute and indefeasible*, so long as the said sentence of condemnation remained in force, so that by *no act of Congress* passed subsequently to the said sentence and condemnation could such his right be affected, impaired, or divested."

McLane, therefore, thought "there was an unequivocal intention on the part of the government to remit his share" by the act of July 29, but insisted that his right "*was absolute and indefeasible*," and, therefore, Congress could not *affect, impair, or divest* it. McCulloh and all others interested not only thought it was the unequivocal intention of Congress to remit their share by the act of January 2, but did not question the power of Congress to do so, and paid over what that law called *duties* as they paid other duties, without claiming to divide them with the government. The process for converting them into part of the forfeiture was not invented till after the decision in 10 Wheat. of the United States *vs.* Morris, p. 246, when it was found necessary to abandon the position previously taken that Congress had no power to do what it professed to do in the act of July, 1813, and take the position that if it had such power, the exercise of it was so subversive of existing rights that it ought to be evidenced by terms susceptible of *no doubt*, and that the terms were not sufficiently explicit to justify the opinion that Congress intended to subvert such rights. But this change of position is merely *apparent*. The reason which governs the result is the same—the vested rights of the officers. The difference consists merely in a change in the mode of applying it. In his protest it is because these rights are vested that Congress cannot remit the forfeiture by an act which it was conceded on all hands had that object in view. After the Supreme Court decide in Morris' case, on a construction of both the act of 1799, as well as that of 1797, that such rights, according to the law which created them, are not *absolute* till the money is received for distribution, and that they might have been remitted by the Secretary of the Treasury under the act of 1797 at any time previously, without further legislative authority, it is then contended that the act of 1813 had been improperly construed by himself and everybody else, because Congress could not have intended to release *existing* rights founded on meritorious services, &c.

In the first instance the act is nugatory, because Congress could not divest such rights; and in the end it is nugatory, because it is not to be supposed that Congress would do such a thing.

By this process, twenty years after the act went into effect and received universally the construction then given by McLane, it is discovered that this was erroneous; and that during the war, and at its gloomiest period, when our financial embarrassments were at their height, Congress gave the customs officers two and a half millions of dollars collected as duties. It is not said that Congress actually intended this. But it is said that to suppose that Congress did not intend it would be a reflection on that body, and the court must give a different construction to the law from that which it received for twenty years after it was passed for that reason.

The basis on which all the reasoning in support of the claimant's

case rests is, that the customs officers had certain rights in the forfeitures, even prior to the receipt of the proceeds for distribution, which the government was bound to respect. It is not avowed, indeed, that it is contended that the government could not release the forfeitures at any time before the receipt of the money for distribution, but this will be found to be the purport of what is asserted when the propositions are examined.

Morris's case is cited with approbation, and it is admitted that the government may release &c., but this qualification is added, that the government cannot release the share of the officers, and retain its own share of the forfeiture. But does the government retain its own share of the forfeiture in this case whilst releasing that of the officers? Not unless the duties constitute such a share, and are a part of the forfeiture; and the whole question in the case is whether the duties are a part of the forfeiture. It is, therefore, begging the question to say that the government retains its own share, or any part of the forfeiture.

There is, therefore, nothing left to consider in the argument, except the grounds upon which the natural and accepted construction of the act at the time of its passage, and for twenty years afterwards, was abandoned; or why it is supposed that such a construction involved a disregard of rights, which it was inadmissible to suppose Congress intended to divest; in other words, the *nature* of rights, which are not vested or recognizable in law, but yet are so sacred. It is not pretended that these officers had any but what are called *inchoate rights*, or any which could not be remitted by Congress; but, nevertheless, it is said, "the duty of the collector in superintending the collection of the revenue, and in making seizures for supposed violations of law, is onerous, and full of perplexity. If he seizes goods it is at his own peril, and he is condemnable in damages and costs if it shall turn out, upon final adjudication, that there was no probable cause for the seizure," &c.

What are described on page 426 as "*inchoate* rights," and on page 428 as "*existing* rights," are thus supposed to be founded on service attended with perplexity and risk, and they are therefore, such rights as that whilst the court admits that Congress *may* release them, yet such a release, says the court, must be "evidenced by terms susceptible of no doubt." But in the case of Morris the court say, at page 99, (6 Cond. R.,) that "the forfeiture is to the United States," and that the 91st section of the act of 1799, "creating the right of the custom-house officers, does not vest any absolute right in them until the money is received" (for distribution); and, speaking of the act of 1797, says, "the law was made for the benefit of those who had innocently incurred the penalty, and not for the benefit of the custom-house officers." This applies equally to the act of 1813. Nor does the date of the act for the remission of the forfeitures, or the reasons which may have induced its passage, affect the question. As the forfeiture is to the United States, and the rights of the officers under the act of 1799 are but a *conditional* interest, which is no interest at all till the condition attaches, it follows that the United States may, by law, at any time before the actual receipt of the money for distribution, prevent the consummation of the right by remitting the for-

feiture, or by making any other disposition of the subject which Congress should deem just and proper.

In the case of Morris, the court does not consider the nature of the interest allowed to the officers, but Mr. Justice Johnson, in his separate opinion, says it is "a *mere boon* from the government, which they may *justly*, and do practically, reserve a sovereign control over till so paid under their laws. The gift is from them of a thing forfeited to them, and they may modify and withdraw that gift *ad libitum*."

But the court decides the question on a construction of the statutes, and does not give an opinion on the question whether the interest of the officers is to be regarded as *a mere boon*, as Justice Johnson regards it, or whether it is compensation for the trouble and risk attending the seizures, as it seems to be considered in McLane's case. The point is a debatable one. Justice Johnson, it seems to me, was right, because the risk and trouble to the officers attending seizures, upon which the opposite opinion is founded are practically, altogether nominal. They are not subject to damages at all except where the seizures are judged to have been made without probable cause, which can rarely happen, and when it has happened the damages have, in all cases, I believe, been paid by the United States. The object of the law in allowing a large part of the forfeiture to the officers, was to give them an *interest* to enforce the law, and to put it out of the power of importers to secure their connivance in violating it. It was, as Justice Johnson expresses it "*a boon*," made on purpose much larger in amount than an importer could afford to give, in order to outbid him, and thus to put the *amount* of the *boon*, as well as official duty, on the side of the government.

But as respects the decision of the question before the court, this question is entirely immaterial, and, therefore, the reserve of the court in Morris' case in respect to it was appropriate. As it is admitted that the law gave no vested interest to the officers till the money was received for distribution, and therefore no interest which the court could take notice of, the motives in the minds of the legislators for giving it then, and withholding it till then, were equally beyond the knowledge of the court, and all reasoning about them was merely speculative, and certainly authorized no construction of the words of the law itself at variance with the ordinary and accepted signification of its language.

But in McLane's case it has not only been assumed that the share of the forfeitures granted the customs officers is as compensation for services attended with risk and perplexity, but for this reason the court declares that no act of Congress will be permitted to subvert the "*existing rights*" founded on such service, if any other construction can be given to the law; and when this declaration is considered in connexion with the law actually before the court, which McLane himself and every one else had construed for twenty years as designed to release, or, as the court expresses it, to subvert such rights, it is tantamount to saying that no form of language could be used which would be so construed by the court.

It is plain, therefore, that what is merely termed in this opinion an existing or inchoate right receives in fact the consideration of a vested

right, the case of Morris to the contrary notwithstanding; and that whilst the authority of Congress is admitted in form, its act is in fact set aside by the refusal of the court to give it the *construction* which the language used requires.

I have shown, I think, that the decision in McLane's case, when since brought to the attention of the court in Hoyt's case, was not approved. The dissatisfaction with the course of reasoning adopted in the former case is apparent in every line of the statement of that reasoning in the latter: and on the only material point to the decision of this case, that duties as duties may be received on forfeited goods, and that they are no part of the forfeiture in which the officers share, I think the decision in McLane's case is directly overruled; or if not, and there be any distinction between the cases which renders the rulings consistent, then I insist that the same distinction exists between this case and McLane's.

But although I have given so much space to the consideration of the opinion in McLane's case, and have attempted to show that it was overruled in Hoyt's case, I have done so altogether out of consideration to the deservedly great weight due to the opinions of the court from the talent and learning of the judges, and not because the decisions are obligatory here as in courts from whose judgments an appeal may be made to it. There being no appeal from the decisions here to the Supreme Court, the judges of this court are obliged to be governed by their own opinions in their judgments, however much they may defer to the opinion of that court, or should wish to accord with it in opinion. This case illustrates the mischief which would arise from any other course.

If the court should not agree with me in thinking the case of McLane, overruled in the essential point affecting this case by the decision in Hoyt's case, and should relinquish their own opinions on the law in deference to what they may think was ruled in McLane's case, there would be in fact no decision on the law of the case by any court, because, as we have not the right of appeal to the Supreme Court to know whether its real opinion on the law had been followed, we should have only the judgment of this court as to what that opinion formerly was, as derived from two other cases. There might be a mistake as to the former opinion, or, if not, that might not be the opinion which the Supreme Court would now pronunce.

I also rely on the settlement of McCulloh's account with the treasury, made under a full knowledge of all the facts of the case as now presented as a bar to this claim. I have labored this point heretofore fully in the case of David Wood, claiming the return of moneys paid for duties without protest. I make my brief in that case a part of this. The ground on which a majority of the court differed from me in that class of cases, that the payment was exacted as a condition precedent to the delivery of the goods, does not exist here. It is said in argument, by way of making out a case of duress, however, that being under the orders of the Secretary, the officer was obliged to pay over the duties, or he might have lost his office, &c. But this even is not *alleged* in the petition. As there presented, it is simply a payment into the treasury of money which would not have been made, if McCulloh had known as much about the law then as since McLane's

case was decided, and, for aught that appears in the petition, or, for that matter, even in the argument, he was quite as much at liberty to present *the claim* then, if not to retain the money, as at this time. Nothing done by the government or by individuals could be considered settled without the aid of this principle. And for this reason such settlements are on the footing of *res judicata*.

M. BLAIR.

JAMES H. MCCULLOH, EXECUTOR OF JAMES H. MCCULLOH, DECEASED, *vs.* THE UNITED STATES.

Judge BLACKFORD's opinion.

The petition in this case contains the following statements:

1. That the testator was collector of the customs for the district and port of Baltimore, in the State of Maryland, from 1808 until the time of his death, in 1836, and as such collector was entitled to a certain part of certain fines, penalties, and forfeitures incurred at said port during his term of office.

2. That between the 1st of August and the 31st of December, 1812, the testator, as such collector, seized, to the use of the United States, as forfeited, a large quantity of merchandise, which had been at certain times in 1812 imported into said port in certain ships in violation of certain acts of Congress mentioned in the petition.

3. That informations were filed against said merchandise in the district court of the United States for the district of Maryland, to which informations the claimants of the merchandise filed their answers; that the merchandise was appraised and delivered to those claimants, who executed their bonds for the appraised value, having previously executed duty bonds as if the merchandise had been legally imported, which duty bonds and the cash paid for duties amounted to $486,649 80, being the amount of duties which would have been payable on said merchandise had the same been lawfully imported.

4. That subsequently to those proceedings, the claimants of the merchandise petitioned the judge of said court for a remission of said forfeitures; and the petition and a certain statement of facts having been transmitted by the judge to the Secretary of the Treasury, the Secretary, in accordance with the act of Congress of the 2d of January, 1813, entitled "An act directing the Secretary of the Treasury to remit fines, penalties, and forfeitures in certain cases," remitted all the fines, penalties, and forfeitures incurred as aforesaid, upon the costs and charges being paid, and on payment of the duties which would have been payable on said merchandise if legally imported.

5. That said remissions were granted before the rendition of any judgments of forfeiture; that, in accordance with the reservation in the remissions, the said petitioners to the judge paid said costs and charges, and also paid the bonds which had been given as for the duties on said merchandise; that the money so paid, which amounted to $486,649 80, was, by said collector, accounted for and paid into

the treasury of the United States in the same manner as lawful duties were accounted for and paid.

6. That therefore the said collector in his lifetime, and his executor since, was entitled to one-sixth of the money received by the United States aforesaid, which one-sixth amounts to $81,108 30.

The evidence shows that the sum of $486,649 81 paid into the treasury was the amount levied on the merchandise as duties, and was paid into the treasury as duties, and that the testator as collector received thereon his commissions, amounting to the sum of $1,824 94.

This suit is brought to recover back from the United States one-sixth part of the money paid into their treasury as aforesaid.

My opinion is, that the suit cannot be sustained. The money was voluntarily paid by the testator, and received in good faith by the United States, with a full knowledge by both parties of all the facts connected with the case, and with the belief, so far as we are informed, that the amount was as duties legally due to the United States. The amount so received by the United States was the sum to which they would have been entitled as duties, and the amount received by the testator was the sum to which he would have been entitled as commissions, had the goods been legally imported. It appears to me that under those circumstances the money should remain where the parties by their agreement placed it.

The ground relied on to sustain the suit is, that the money was paid under a mistake of the law. But from the view I take of the case, it does not seem to be at all material whether the payment was made under such mistake or not. The authorities are, in my opinion, abundant to show that where money has been paid under the circumstances of this case as above stated, the mere fact that the payment was made in ignorance of the law, or under a mistake of it, will not authorize the recovery of it back.

In Chitty on Contracts the language used is: "And with respect to payments made by *mistake*, this difference exists, namely, that if the plaintiff were merely ignorant of the *law* or *legal effect* of all the circumstances under which he paid the money, he cannot recover back the money so paid: but if he were mistaken as to a material *fact*, and the money was paid under the influence of that mistake, it may be recovered back, although the mistake was as to a fact within his knowledge. Bilbie *vs.* Lumley is a leading case upon this subject. It was an action by an underwriter, upon a policy on a ship, to recover back money he had paid to the defendant as for a loss by capture. A material fact had been concealed from the underwriter, and such concealment would have afforded him a defence; but *after* he had been apprised of the concealment, he paid the money—not being at the time aware of the legal effect thereof—and it was held that he could not recover back the amount."—(Chitty on Contracts, 9th Amer. ed., 640.) That is the doctrine of courts at law. The general rule is the same in courts of equity. The following is the language used by Judge Story.

"And first in regard to mistakes in matter of law. It is a well known maxim, that ignorance of law will not furnish an excuse for any person either for a breach or for an omission of duty; *Ignorantia*

legis neminem excusat; and this maxim is equally as much respected in equity as in law. It probably belongs to some of the earliest rudiments of English jurisprudence, and is certainly so old as to have been long laid up among its settled elements. We find it stated with great clearness and force in The Doctor and Student, where it is affirmed that every man is bound at his peril to take knowledge what the law of the realm is, as well the law made by statute as the common law. The probable ground for the maxim is that suggested by Lord Ellenborough, that otherwise there is no saying to what extent the excuse of ignorance might not be carried. Indeed, one of the remarkable tendencies of the English common law upon all subjects of a general nature is, to aim at practical good, rather than theoretical perfection, and to seek less to administer justice in all possible cases than to furnish rules which shall secure it in the common course of human business. If upon the mere ground of ignorance of the law, men were admitted to overhaul or extinguish their most solemn contracts, and especially those which have been executed by a complete performance, there would be much embarrassing litigation in all judicial tribunals, and no small danger of injustice, from the nature and difficulty of the proper proofs. The presumption is, that every person is acquainted with his own rights, provided he has had a reasonable opportunity to know them. And nothing can be more liable to abuse than to permit a person to reclaim his property upon the mere pretence that, at the time of parting with it, he was ignorant of the law acting on his title. Mr. Fonblanque has accordingly laid it down as a general proposition, that in courts of equity ignorance of the law shall not affect agreements nor excuse from the legal consequences of particular acts. And he is fully borne out by authorities."—(1 Story's Commentaries on Equity, 121.)

The following is copied from Parsons on Contracts:

"Law gives no relief where the mistake is one of law, or one arising from ignorance of law. This is well settled. It was once intimated that the maxim '*Ignorantia legis neminem excusat*' applied only to crimes and public offences; but it is now universally agreed that it is of equal force in civil cases at law. Whether this rule has equal force in equity may not be quite so certain. In England, at least, there is some conflict. But even there the courts of equity appear now to adopt this rule; and in this country the high authority of the Supreme Court of the United States, as well as the State courts generally, may be regarded as having conclusively established the rule, subject perhaps to some qualification in particular cases."—(2 Parsons on Contracts, 2d ed., 556.)

There is the following decision on this subject in the Supreme Court of the United States: In 1818, R. Griffing drew a bill of exchange in Kentucky on J. Daniel for $10,000 in favor of H. Daniel, payable at New Orleans. The bill was accepted and endorsed to the Bank of the United States, and was afterwards protested for non-payment. The bank looked to the parties on the bill not only for the amount of the bill and charges of protest, but also, under a Kentucky statute, for ten per cent. damages on the bill. The drawer and acceptor believing the ten per cent. damages to be required by the statute, paid

$3,330 67 on account of the aggregate amount supposed to be due, and for the balance gave their note with sureties for $8,000. On that note $500 were afterwards paid, and a new note given to the bank for the balance. The bank afterwards sued on the last named note in the circuit court of the United States for the Kentucky district, and recovered judgment. The judgment debtors then filed a bill in equity in said court, stating, *inter alia*, that the bank was not entitled to said ten per cent. damages by the statute of Kentucky, and that the amount of those damages were included in said $8,000 note by *mistake*. The bill prayed that the judgment be enjoined as to the ten per cent. damages, which damages amounted to $1,000 and interest. The injunction was granted, and the bank appealed to the Supreme Court of the United States.

The Supreme Court reversed the judgment, and in their opinion used the following language:

"The main question on which relief was sought by the bill, that on which the decree below proceeded, and on which the appellees rely in this court for its affirmance, is, can a court of chancery relieve against a mistake of law? In its examination we will take it for granted the parties who took up the bill for ten thousand dollars, included the damages of a thousand dollars in the eight thousand dollar note, and did so, believing the statute of Kentucky secured the penalty to the bank; and that, in the construction of the statute, the appellees were mistaken. Vexed as the question formerly was, and delicate as it now is, from the confusion in which numerous and conflicting decisions have involved it, no discussion of cases can be gone into without hazarding the introduction of exceptions that will be likely to sap the direct principle we intend to apply. Indeed, the remedial power claimed by courts of chancery to relieve against mistakes of law is a doctrine rather grounded upon exceptions than upon established rules. To this course of adjudication we are unwilling to yield. That mere mistakes of law are not remediable is well established, as was declared by this court in Hunt vs. Rousmanier, 1 Peters, 15; and we can only repeat what was there said, 'that whatever exceptions there may be to the rule, they will be found few in number, and to have something peculiar in their character,' and to involve other elements of decision. (1 Story's Ch., 129.)

"What is this case, and does it turn upon any peculiarity? Griffing sold a bill to the United States Bank at Lexington for ten thousand dollars, endorsed by three of the complainants, and accepted by the other, payable at New Orleans; the acceptor, J. D., was present in Kentucky when the bill was made, and there accepted it; at maturity it was protested for non-payment, and returned. The debtors applied to take it up, when the creditors claimed ten per cent. damages by force of the statute of Kentucky. All the parties bound to pay the bill were perfectly aware of the facts; at least the principals, who transacted the business, had the statute before them, or were familiar with it, as we must presume; they and the bank earnestly believing (as in all probability most others believed at the time) that the ten per cent. damages were due by force of the statute; and, influenced by this opinion of the law, the eight thousand dollar note was executed,

including the one thousand dollars claimed for damages. Such is the case stated, and supposed to exist by the complainants, stripped of all other considerations standing in the way of relief.

"Testing the case by the principle 'that a mistake, or ignorance of the law, forms no ground of relief from contracts fairly entered into with a full knowledge of the facts,' and under circumstances repelling all presumptions of fraud, imposition, or undue advantage having been taken of the party, none of which are chargeable upon the appellants in this case; and the question then is, were the complainants entitled to relief? To which we respond decidedly in the negative."—(The Bank of the United States *vs.* Daniel, 12 Peters, 32.)

The present claimant's testator, Mr. McCulloh, lived about twenty-four years after the payment of the money now sued for; that is, till the year 1836, and continued in office until his death; but it does not appear that he ever presented the claim to any of the departments, or to Congress; nor does it appear to have been so presented at any time since his decease by his representative; nor is there any testimony offered explanatory of the delay.

The goods in question, with others, had been imported under a mistake relative to certain British orders in council, and without any real fault of the importers. It was to be expected that the importations would be placed on the same footing as if they had been legal. They amounted to about eighteen millions of dollars, and the duties to about five millions of dollars.—(8 Amer. State Papers, 571.)

If the present suit be sustained, it is upon the ground that, by the remission, the custom-house officers are entitled to receive one-half of those duties, notwithstanding they may have voluntarily paid over the money to the treasury, under the abovementioned circumstances of this case, and have received their commissions; and notwithstanding between forty and fifty years have been suffered to elapse without complaint. I do not accede to that doctrine. It is not, in my opinion, in accordance with the authorities already referred to. The case of McLane, cited at the bar, is clearly distinguishable from this case, for the reason, were there no other, that in McLane's case, the money had not been paid over to the treasury of the United States.

The present case, it is true, is between an individual and the government; but I know of no principle by which it can be distinguished from a case between individuals.

It is the opinion of the court that the claimant is not entitled to recover.

IN THE COURT OF CLAIMS.

JAMES H. MCCULLOH, EXECUTOR OF JAMES H. MCCULLOH, *vs.* THE UNITED STATES.

LORING, Justice.

The facts of the case are that James H. McCulloh, as collector for the district and port of Baltimore, between the first day of August, and the thirty-first day of December, 1812, seized certain goods and merchandise, (specified in exhibit B,) as forfeited to the United States by a violation of the non-intercourse acts of March 1, 1809, (2 U. S. Stat. at Large, 529,) and March 2, 1811, (ib., 651.) The goods and merchandise belonged to citizens of the United States, and arrived at Baltimore between the first day of August and the fifth day of November, 1812, (exhibit A,) in nine vessels, which "did depart from some port or place in the United Kingdom of Great Britain and Ireland between the twenty-third day of June and the fifteenth day of September, 1812." (Exhibit C, 1 to 18 inclusive.)

Informations were filed in the district court of the United States for the district of Maryland, and the proper proceedings were had to enforce the said forfeitures.

On the arrival of the goods their owners gave bonds at the custom-house for the duties upon them "*as if they had been legally imported*;" (exhibit B ;) and when the informations were entered in court, the owners appeared and filed their answers, and also prayed that the goods and merchandise might be redelivered to them according to the provisions of the 89th section of the United States act of March 2, 1799.—(U. S. Stat. at Large, 1 vol., p. 627.) Thereupon the goods and merchandise, by the order of the court, were appraised and redelivered to the claimants, upon their executing bonds for their appraised value, according to the provisions of the section referred to.

Pending the proceedings in court and before judgment, the forfeitures of the goods and merchandise were remitted by the Secretary of the Treasury, by the several acts of remission set forth in exhibit C, 1 to 21 inclusive. The owners of the goods paid their bonds given at the custom-house for the duties on the goods "as if they had been legally imported," and thus cancelled those bonds. The lawful duties thus paid amounted to the sum of four hundred and eighty-six thousand six hundred and forty-nine dollars and eighty cents. (Exhibit A.)

This sum, James H. McCulloh, the collector, accounted for and paid into the treasury of the United States "in the same manner as lawful duties were accounted for and paid;" and the petitioner, as the executor of the said James H. McCulloh, claims one-sixth of this sum, or eighty thousand one hundred and eight dollars and thirty cents, as the share or proportion belonging to his testator under the 91st section of the United States act of March 2, 1799, (1 Stat. at Large, 697,) which section provides for the distribution of fines, penalties and forfeitures. The claim of the petitioner is thus stated : "The petitioner, however, does not set up a claim to one-sixth of the things forfeited, but to the proportion to which his testator, as collector, was entitled

to of the amount reserved to the government as the condition of the remission, and which the government actually received."

On recurring to the acts of remission, (exhibits C, 1 to 21, inclusive,) it will be seen that three of them, viz: No. 19, 20, 21, were made by the Secretary of the Treasury, under the U. S. act of March 3, 1797, (1 Stat. at Large, 506;) while all the other acts of remission were made under the act of January 2, 1813, (2 Stat. at Large, 789.) This difference in the acts of remission is not noticed in the petition, nor in the briefs submitted in the case; and the argument submitted for the petitioner seems inapplicable to the remissions No. 19, 20, 21, made by the Secretary of the Treasury, under the act of March, 3, 1797, and to be addressed solely to the remissions made under the act of January 2, 1813, which was passed after the seizures were made.

By the act of March 3, 1797, (1 Stat. at Large, 506,) it is enacted, that the Secretary of the Treasury shall "have power to remit such fines, forfeitures, or penalty, or remove such disability or any part thereof, if in his opinion the same shall have been incurred without wilful negligence or any intention of fraud in the person or persons incurring the same; and to direct the prosecution, if any shall have been instituted for the recovery thereof, to cease and be discontinued upon such terms or conditions as he may deem reasonable and just.

The act of January 2, 1813, (2 Stat. at Large, 789,) in relation to fines, penalties, and forfeitures incurred under the non-intercourse acts by the importation of goods shipped from any port or place in the United Kingdom of Great Britain and Ireland, between the 23d June and 15th September, 1812, enacts as follows: "The Secretary of the Treasury is hereby directed to remit all fines, penalties, and forfeitures that may have been incurred under the said acts, in consequence of such shipment, importation or importations, upon the costs and charges that have arisen, or may arise, being paid, and on payment of the duties which would have been payable by law on such goods, wares, or merchandise if legally imported; and also to direct the prosecution or prosecutions, if any shall have been instituted for the recovery thereof, to cease or be discontinued."

Whether the claim of the petitioner is for a proportion of the duties paid upon the goods, of which the forfeitures were remitted, under both or only under the latter of the two statutes last cited, I think that the answer is the same, viz: That in all these cases the United States reserved nothing as the condition of the remission, and received from the importers only *legal duties*. Such duties are merely the price every lawful importer pays for the entry of his goods, and they belong exclusively to the United States as the fixed legal equivalent for their grant of entry, and the reservation of only lawful duties such as every lawful importer pays, furnishes no inference that they were reserved as the condition of the remission of a forfeiture incurred. Such "legal duties" are always reserved in the remission of a forfeiture, under the act of 1797, for the Secretary of the Treasury has no authority to remit them, and the nature of "legal duties" is not changed by being reserved under the act of January 2, 1812. All that can belong to seizing officers, by the statute of 1799, is their share of the proceeds of goods forfeited and sold, or of a fine or penalty imposed instead of a

forfeiture, or in mitigation of it; and the difference between these and legal duties is declared in the case of Hoyt *vs.* The United States, 10 Howard, 109. In that case the goods seized were redelivered to the owners on their executing a bond for the legal duties, and also for the appraised value of the goods themselves; the goods were condemned as forfeited and their proceeds were distributed according to law; but Mr. Hoyt, the collector, claimed also a moiety of the legal duties which had been paid on the bond given therefor. The court denied his claim, and said: "A conclusive answer to this claim in the judgment of the court is, that the duties thus paid constitute no part of the proceeds of the goods forfeited, in which only the collector has an interest. The proceeds are the appraised value secured by the bond, or, in case no bond be given, the amount derived from the sale by the marshal after the deduction of the proper charges. The payment of the duties is a condition to the acceptance of the bond and redelivery of the goods, and is the voluntary act of the claimant. They do not enter into the question of condemnation, nor constitute any part of the forfeiture declared by the act or the judgment of the court." If legal duties made no part of the forfeiture where that was enforced, can they be held so to do, where the forfeiture is remitted? And that is exactly the case at bar, as to the three remissions under the act of 1797. And if "*legal duties*," from their nature, belong to the United States and not to the seizing officers in the case of remissions under the act of 1797, for the same reason they would belong to the United States and not to the seizing officers under the act of January 2, 1812. In both cases, and in all cases, *legal duties* are the price of a grant, and not the expiation of an offence.

By the act of March 3, 1797, a discretionary power was given to the Secretary of the Treasury, and he was empowered to remit forfeitures, &c., and to discontinue prosecutions "upon such terms and conditions as he may deem reasonable and just." The act of January 2, 1813, was mandatory upon him, and he was required to remit forfeitures, &c., according to the provisions of the act, which, as has been stated, was passed after the seizures in all these cases had been made.

The argument for the petitioner contends (page 3) "that the right of the seizing officers had attached prior to the enactment of the law under which the remission was made, and that it is not in the power of Congress to operate by legislation upon pre-existing vested rights." The answer is, that all the rights of the officers by the seizure in 1812 were conditional on the right of the United States to remit forfeitures declared by the act of March 3, 1797. And Congress, in the act of January 2, 1813, only used the right declared by the act of 1797.

The argument for the petitioner assumes that the 91st section of the act of 1799, which provides for the distribution of the proceeds of goods forfeited, &c., made a contract with the seizing officers by which, upon the seizure, they acquired a right in their statute proportion, of the proceeds of the goods forfeited, if they were not remitted by the discretionary power of the Secretary of the Treasury.

But when the United States, by the act of March 3, 1797, empowered the Secretary of the Treasury to remit forfeitures, &c., it was not the exhaustion nor a restriction of their right to remit, which

was as absolute as their ownership of the goods, but it was only a provision for one mode of the exercise of that right. The Secretary of the Treasury, under that act, was only their officer or agent; his acts were their acts, and from that derived all their efficiency, and whatever the United States might do by such agent or officer, they might do directly themselves by an act of Congress, and this was the effect of the act of January 2, 1813; it only applied a power, or used a right, which was declared to exist in the United States in 1797. Thus, it was not the *right* to remit the forfeiture which was subsequent to the seizure in this case, but only the exercise of that right, and the mere act of remission is necessarily and always subsequent to the forfeiture. Besides, judicial decisions declare that, as between the United States and the seizing officers, no right is *fixed* or *vested* in them by the seizure, and that their proportion of the proceeds of the goods forfeited is a mere *gift*. This, according to its legal nature, vests no property and no right until it becomes *a gift executed*, and that is, when under the statute the goods have been condemned and sold, and the proceeds received by the collector for distribution among the statute distributees; then his possession is their possession as against the United States, and by such possession, and not before it, their property and rights are *vested*. In 10 Wheaton, 246, United States *vs.* Morris, Thompson, justice, in delivering the opinion of the court, says, in reference to the 91st section of the act of 1799: "The plain and obvious interpretation is, that the right does not become *fixed* until the receipt of the money by the collector."—(p. 291.) And Johnson, justice, in delivering a separate but concurring opinion, says of the distribution provided for in the 91st section of the act of 1799: "This distribution I consider as a mere *boon* from the government, which they may justly, and do practically, reserve a sovereign control over until so paid by their laws. The gift is from them of a thing perfected to them, and they may modify and withdraw that gift *ad libitum*. When once paid away according to legislative will, their control is at an end, and the right then, and not till then, becomes vested and absolute as between them and the officers, who to the last the law regards as *donees*." While the seizing officers are *donees* without possession they are without contract or legal rights, for a gift without possession does not make a contract or a right.

Then it is contended, for the petitioner, that his claim is supported by the decision in McLane *vs.* the United States, 6 Peters, 404. But the reason for the decision in that case does not arise in the case at bar. In the case of McLane *vs.* The United States, the goods were seized as illegally imported, and pending the proceedings against them, and before the distribution of the proceeds of the goods, their owners, by a special act of Congress, (of July 29, 1813, U. S. L. 6 vol., 122,) were allowed to enter the goods on paying *double* the amount of the legal duties upon them. Such *double* duties could not be held legal duties, and were therefore held to be a penalty reserved by the United States, and so reserved as well for the benefit of the seizing officers in their statute proportion as for the United States; and the case is so stated by Judge Story in delivering the opinion of the court, and in forming the question which arises on the special act of Congress. His

words are: "The question then arises, in what light the reservation and payment of the *double duties* as conditions upon which the remission is granted are to be considered. Are the double duties to be deemed a mere payment of lawful duties? or are they to be deemed a part of the forfeiture reserved out of the goods? If the latter is the true construction, then the collector is entitled to a moiety; if the former, he is barred of all claim." This is an emphatic declaration and decision that if the duties reserved had been the lawful duties only, the seizing officers would have had no claim to them. Again, he likens the reservation of the double duties to the reservation of a gross sum as the condition of the remission. Clearly the reservation of a gross sum exceeding the legal duties could be nothing but a penalty, and Justice Story says: "Our opinion is grounded upon the fact that the act refers to the *double duties* as a mere mode of ascertaining the amount, and that it is undistinguishable from the reservation of a gross sum." And the point decided in McLane *vs.* The United States is restated in Hoyt *vs.* The United States, 10 How., 109, where the court say of it: "The only doubt that existed was, whether or not the amount thus reserved should be considered *as legal duties belonging to the government*, or a portion of the forfeiture the residue of which had been remitted. The amount reserved was to be equal to the *double* duties imposed on goods imported, under certain circumstances, by an act which had been passed since the forfeiture occurred; and the court was of opinion that the duties mentioned in that act were referred to simply as a measure to determine the sum to be reserved, and not as duties in the common acceptation of the term." Here again the declaration is distinctly repeated, that if *legal duties* only had been reserved, they would have belonged to the government.

In McLane *vs.* The United States, the inference that the duties reserved were like a gross sum, and so in the nature of a penalty, was drawn solely from the fact that the duties reserved were *double* the legal duties, while in the case at bar there is no ground for such an inference, because the only duties reserved were the legal duties, and the precise difference between the two cases is that the case of McLane *vs.* The United States was not a case of the *remission* of a forfeiture, but a case of the *mitigation* of a forfeiture; while the case at bar is a case of the entire remission of a forfeiture, by which it is legally annulled and made as if it had never been, because its legal consequences are abrogated. This is done when the goods are placed on the same footing as goods legally imported, and that is when they are entered on the payment of *legal duties only*.

Upon the whole case, I am of opinion that the legal duties received by the United States belonged to them exclusively; and that therefore, on the merits of the case, the petitioner has no claim, and is not entitled to the relief he prays for.

IN THE COURT OF CLAIMS.

JAMES H. MCCULLOH, EXECUTOR, *vs.* THE UNITED STATES.

SCARBURGH, J., dissented.

Between the first day of August and the thirty-first day of December, A. D. 1812, James H. McCulloh, the petitioner's testator, as the collector of the customs for the district and port of Baltimore, seized large quantities of goods as forfeited under the non-intercourse acts of March 1, A. D. 1809, (2 Statutes at Large, page 529,) of May 1, A. D. 1810, (2 Statutes at Large, page 605,) and of March 2, A. D. 1811, (2 Statutes at Large, page 651.) The usual proceedings were thereupon had in the district court of the United States for the district of Maryland to enforce the forfeitures. Before judgment, the Secretary of the Treasury in all the cases except three, under the authority of the act of Congress of January 2, A. D. 1813, (2 Statutes at Large, page 789,) remitted the fines, penalties, and forfeitures which had been incurred, upon the costs and charges being paid, and on payment of the duties *which would have been payable by law on the goods, if legally imported.* In the other three cases, the Secretary of the Treasury, likewise before judgment, under the authority of the act of March 3, A. D. 1797, (1 Statutes at Large, page 506,) remitted the penalties and forfeitures which had been incurred, on *payment of costs and duties.*

The parties interested, in pursuance of the terms of remission, paid to the petitioner's testator, collector as above mentioned, the sum of *four hundred and eighty-six thousand six hundred and forty-nine* $\frac{89}{100}$ *dollars*, the amount which would have been payable by law for duties on the forfeited goods if they had been legally imported. Afterwards the petitioner's testator paid or accounted for the same to the United States.

The petitioner insists that the money so paid was reserved out of the forfeitures, and not paid for duties *as such*, and that his testator, under the non-intercourse acts, and the act of March 2, A. D. 1799, was entitled to the one-sixth part thereof. This has not been paid, and it is now claimed by the petitioner.

The act of Congress of January 2, A. D. 1813, was as follows: "In all cases where goods, wares, and merchandise, owned by a citizen or citizens of the United States, have been imported into the United States from the United Kingdom of Great Britain and Ireland, which goods, wares, and merchandise were shipped on board vessels which departed therefrom between the twenty-third day of June last, and the fifteenth day of September last, and the person or persons interested in such goods, wares, or merchandise, or concerned in the importation thereof, have thereby incurred any fine, penalty, and forfeiture, under an act entitled "An act to interdict the commercial intercourse between the United States and Great Britain and France and their dependencies, and for other purposes,' and an act entitled 'An act concerning the commercial intercouse between the United States and Great Britain and France and their dependencies, and for other purposes,' and the

act supplementary to the act last mentioned, on such person or persons petitioning for relief to any judge or court proper to hear the same, in pursuance of the provisions of the act entitled 'An act to provide for mitigating or remitting the fines, forfeitures, and penalties, in certain cases therein mentioned;' and on the facts being shown, on inquiry had by said judge or court, stated and transmitted, as by said act is required, to the Secretary of the Treasury; in all such cases wherein it shall be proved to his satisfaction that said goods, wares, and merchandise, at the time of their shipment, were *bona fide* owned by a citizen or citizens of the United States, and shipped, and did depart from some port or place in the United Kingdom of Great Britain and Ireland, owned as aforesaid, between the twenty-third day of June last and the fifteenth day of September last, the Secretary of the Treasury is hereby directed to remit all fines, penalties, and forfeitures, that may have been incurred under the said acts in consequence of such shipment, importation, or importations, upon the costs and charges that have arisen, or may arise, being paid, and on the payment of the duties which would have been payable by law on such goods, wares, and merchandise if legally imported; and also to direct the prosecution or prosecutions, if any shall have been instituted for the recovery thereof, to cease and be discontinued: *provided, nevertheless*, that no case in which the purchase of such goods, wares, and merchandise was made after war was known to exist between the United States and Great Britain at the port or place where such purchase was made, shall be entitled to the benefits of this act."—(2 Statutes at Large, page 789 and 790, chapter 7.)

By the subsequent act of July 29, A. D. 1813, it was provided "that the owners of the ships called the Good Friends, the Amazon, and the United States, and of the cargoes on board said vessels, which vessels arrived in the month of April, one thousand eight hundred and twelve, in the district of Delaware, from Amelia Island, with cargoes that were shipped on board said vessels in the United Kindom of Great Britain and Ireland, shall be entitled to and may avail themselves of all the benefits, privileges, and provisions of the act entitled 'An act directing the Secretary of the Treasury to remit fines, forfeitures, and penalties in certain cases,' passed on the second day of January last past, in like manner and on the same conditions as though said vessels had departed from the kingdom aforesaid between the twenty-third day of June and the fifteenth day of September, mentioned in said act, and had arrived within the United States after the first day of July last."—(6 Statutes at Large, page 122, chapter 32, § 1.)

Under the the authority of the last mentioned act, the Secretary of the Treasury remitted the forfeiture which had been incurred in the case of the ship Good Friends and her cargo, upon payment of the duties which would have been payable by law on the goods, if they had been legally imported after the passage of the act of July 1, A. D. 1812, ch. 112, (2 Stat. at Large, p. 768,) *i. e.*, upon payment of the double duties imposed by the last mentioned act. In the case of McLane *vs.* The United States, (6 Peters, R. 404,) it was held that the duties so paid were a part of the forfeiture, and reserved as well for the collector

as for the United States. The court were of the opinion that goods imported in violation of the non-importation acts, being prohibited goods, were not entitled to entry at the custom-house, or to be bonded; and that no duties *as such*, could legally accrue upon their importation. They were also of the opinion that the act of July 29, A. D. 1813, taken in connexion with the act of January 2, A. D. 1813, in requiring the payment of double duties—*i. e.*, the duties which would by law have been payable on the goods, if they had been legally imported after the first day of July, A. D. 1812—as a condition on which the forfeiture should be remitted, merely referred to those duties as a mode of ascertaining the amount to be reserved out of the forfeiture; that it is undistinguishable from the reservation of a gross sum; and that it was not a declaration of intention on the part of the government that they were to be received as legal duties due upon a legal importation.

I propose to consider the petitioner's case under two aspects: 1st, with reference to the remissions made under the act of January 2, A. D. 1813; and, 2d, with reference to the remissions under the act of March 3, A. D. 1797.

1. Considering this case with reference to the remissions under the act of January 2, A. D. 1813, the case of McLane *vs.* The United States, so far as it goes, is, it seems to me, precisely analogous to it. In that case as in this, the goods at the time of their importation were subject to no duty; their importation was expressly prohibited by law; they had been forfeited to the United States; the owner of them had become liable to pay, *not duties*, but a penalty equal to treble their value; and the act under which the remissions were made, was passed *after, and not before* the goods were imported. In all these respects, therefore, the analogy between the two cases is complete.

Moreover the act of July 29, A. D. 1813, did no more than merely extend to the cases therein mentioned the act of Janary 2, A. D. 1813, by declaring, in effect, that the parties interested should be entitled to and might avail themselves of all the benefits, privileges, and provisions of the latter act, *in like manner and on the same conditions* as though their cases had fallen within its particular provisions. In other words, the act of July 29, A. D. 1813, merely adopted as the law which should govern the cases therein mentioned the act of January 2, A. D. 1813. It is therefore to my mind entirely clear, that an interpretation of the act of July 29, A. D. 1813, taken in connexion with the act of January 2, A. D. 1813, is an interpretation of the latter act itself.

The only point in which it has ever been suggested that the analogy between the case of McLane *vs.* The United States and this case, under the aspect which I am now considering, is not complete, is, that in the former case the duties exacted as a condition of the remission were *double* the duties which would have been payable by law on the goods if they had been legally imported, at the time of their actual importation; whilst in this case, the duties exacted as a condition of the remission were only *such* duties as would have been payable by law on the goods if they had been legally imported, at the time of their actual importation. But it seems to me, this difference is wholly

immaterial. The duties were the *same* in both cases. No duties, *as such*, legally accrued or were demandable upon the goods at the time they were imported in either case. There was then no law in force imposing duties upon such goods so imported. The law applicable to them, instead of imposing duties upon them, subjected them to forfeiture, and their owners, *not to duties*, but to a penalty equal to treble their value. Hence the act of January 2, A. D. 1313, required the payment, not of the duties which *had* by law accrued and become payable, but of the duties which *would* have been payable by law on the goods, *if they had been* legally imported. It is for this reason that the court in the case of McLane *vs.* The United States, were of the opinion that the statute refers to the double duties as a mere mode of ascertaining the amount to be reserved out of the forfeiture. But it is obvious that this reason is as applicable in this case as in the case of McLane *vs.* The United States. Moreover it would be an anomaly in legislation, (to say nothing about the constitutional power of Congress over the subject,) *after* goods had been imported, *then* to enact a law imposing a duty upon their importation. With entire respect for those who differ with me in opinion, I am constrained to say, that I am wholly unable to comprehend how, in the case of McLane *vs.* The United States, it can be truly said that the double duties were referred to as a mere mode of ascertaining the amount to be reserved out of the forfeiture, and yet the same thing is not true in this case. Nor can I understand how the same words in the act of January 2, A. D. 1813, when applied to the cases provided for by the act of July 29, A. D. 1813, shall have one meaning, and when applied to the cases provided for in the former act, a totally different meaning.

Although in the case of McLane *vs.* The United States, the goods were imported before the act of July 1, A. D. 1812, yet their owners were guilty of a crime against the United States, the same in kind and degree with that which had been committed by the owners, respectively, of the goods in the cases provided for in the act of January 2, A. D. 1813. Hence the same measure of remission was provided for both classes of cases. Inasmuch as in the case of McLane *vs.* The United States, the goods being prohibited goods were subject to *no duties*, the exaction of any amount though in the name of duties, was still a penalty. In this respect the only difference between the exaction of the duties which were payable by law on a legal importation *when* those goods were imported, and the exaction of the duties which were payable by law on a legal importation *when* the remission was made, was in degree, and not in kind; the exaction was as much, though not so great a penalty in the one case as in the other. In both cases it was something which had never been imposed except by way of penalty or forfeiture; in other words, it was a part of the forfeiture.

In the case of Hoyt *vs.* The United States, 10 How. R., 109, the goods were condemned for a violation of the revenue laws, and at the time of their importation were subject by law to the very duties which were paid. After the seizure of the goods and the institution of proceedings for their forfeiture, the parties interested were allowed to take possession of them upon their executing bonds, with sureties, for

the payment of a sum equal to the appraised value of the goods, and producing a certificate from the collector and naval officer that the duties on the goods had been paid or secured. But the payment of such duties in no way depends on the result of the prosecution. They are paid whether the prosecution fails or succeeds. "They do not enter into the question of condemnation, nor constitute any part of the forfeiture declared by the act or the judgment of the court." The distinction, and it is a broad one, between the case of Hoyt *vs.* The United States and that of McLane *vs.* The United States is, that in the former the goods *were*, but in the latter they *were not* at the time of their importation, subject to duties. Hence in the former, the duties paid were paid *as duties* but in the latter, the sums paid were duties in *name* only, whilst in fact and in law they were a part of the forfeiture.

2. Considering this case with reference to the remissions made under the act of March 3, A. D. 1797, it is still more plain that the amount reserved in the name of duties was but a reservation out of the forfeiture. Under that act the Secretary of the Treasury has power in the cases therein provided for, "to mitigate or remit such fine, forfeiture, or penalty, or remove such disability, or any part thereof, if, in his opinion, the same shall have been incurred without wilful negligence or any intention of fraud in the person or persons incurring the same; and to direct the prosecution, if any shall have been instituted for the recovery thereof, to cease and be discontinued upon such terms or conditions as he may deem reasonable and just." Unless this act gives to the Secretary of the Treasury the legislative power to impose duties on importations where none are imposed by law, then whatever he reserved in this case could have been lawfully reserved only in mitigation and as a part of the forfeiture. It cannot be pretended that any such power was conferred upon the Secretary of the Treasury. It is his duty to execute not to make laws. There can be no doubt that under the power to impose such conditions as he may deem reasonable and proper, he may require, as a condition on which the prosecution shall be discontinued, that the duties payable by law on the goods shall first be paid to the collector. But he can lawfully do no more. He cannot create new duties unknown to the revenue laws. The 89th section of the act of March 2, A. D. 1799, ch. 128, (1 Stat. at L., p. 695,) has no application to the prosecutions under the non-intercourse acts.—(*The Brig Struggle*, 1 Gallison R., 470.)

It has been suggested that the payment by the petitioner's testator of the several sums of money received by him for the reservations above mentioned was a voluntary payment, and that he cannot, therefore, recover back the proportion thereof to which his testator was entitled. He obviously made the payment in discharge of what was believed to be his official duty. The sums so paid were regarded both by him and the government as *duties*, and not as a part of the forfeiture. The law did not require the payment, but it was made with a knowledge of all the facts, under a mutual mistake of the law, both parties having the law in contemplation and in good faith meaning to conform to it, but acting under a misconstruction ascertained by a subsequent decision of the Supreme Court of the United States.

The payment embraced not only money to which the petitioner's testator was entitled, but also money to which the naval officer and surveyor were entitled, the one half thereof being subject to distribution amongst the collector, naval officer, and surveyor, and the other half being due to the United States. To say that the payment was voluntary, *i. e.* a *gift* to the United States, is to say that the collector took upon himself to give to the United States not only his own money, but the money of the other two officers. This, to my mind, is obviously in direct conflict with the truth. In a case like the present, between individuals, I consider the true principle to be, that when money is paid by one under a mistake of his rights and his duty, which he was under no legal or moral obligation to pay, and which the other has no right in good conscience to retain, it may be recovered back, whether such mistake be one of fact or of law.—(Northrop *vs.* Graves, 16 Conn. R., 548, and the cases cited in the opinion of this court in Sturges, Bennett & Co. *vs.* The United States.)

In the case of Hunt *vs.* Rousmanier, 1 Peters' R., 1, and also in the case of The Bank of the United States *vs.* Daniel, 12 Peters' R., 32, the decision of the court rests on the ground that the money might be conscientiously retained. But in the case of Wheeler *vs.* Smith, 9 How. R., 55, a release from an heir-at-law to executors, made with a knowledge of all the facts but under a mutual mistake of law, was set aside because it was against conscience to retain it. The court say: "The influence operating upon the mind of the complainant induced him to sacrifice his interests. He did not act freely and *with a proper understanding of his interests.*"

This principle it seems to me applies with peculiar force where the payment is made by a public officer in discharge of what he, by mistake of law, believes to be his official duty. It would be impolitic and unwise to discourage such fidelity. The most elevated good faith, *uberrima fides*, should be observed in all the relations between the government and its officials. It would indeed be a dangerous principle which would require a public officer to deal at arm's length with his government in his official transactions. On the contrary, whenever he acts in good faith, under a conscientious conviction of duty, no mistake either of fact or of law, at least as between him and the government, should subject him to loss. When, therefore, under a mistake of his rights and his duty he pays to the government money, which in good faith he believes is due to the government, but which the government itself has by law declared is really his own, and which would not have been paid or demanded if the law had not been mistaken, his right to recover it back it seems to me is sustained not only by the just principles of law and good morals, but by the obvious dictates of an enlightened public policy. Money so paid cannot be conscientiously retained. It may I think be said of the petitioner's testator as it was of the complainant in Wheeler *vs.* Smith, and even with greater emphasis: "*He did not act freely and with a proper understanding of his interests.*"

My opinion is, that the petitioner is entitled to relief.